

NTSB Order No. EA-5026

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of March, 2003

Docket SE-16443

Respondent, appearing pro se, has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on July 2, 2002, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending respondent's airline transport pilot certificate for 15 days, on finding that respondent had violated 14 C.F.R. 121.543(a) and 91.13(a) of the Federal Aviation Regulations (FARs), 14 C.F.R.

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Parts 121 and 91.² We deny the appeal.³

Respondent was the relief officer on Atlas Air Flight CV-775, a Boeing 747-400 Part 121 cargo flight from Los Angeles to Luxembourg. There were three crew: the captain; a first officer; and respondent, the relief pilot. There were also three "pre-IOE"⁴ pilots on the aircraft as observers and one dead-heading Atlas pilot. Sometime during the early hours of the flight, the aircraft's captain (and pilot-in-command) asked respondent to take over for him so that he might rest, and respondent did so. Later, the first officer left the flight deck, also to rest. When the captain returned from the upper deck, he found respondent in a jump seat and two of the pre-IOE observers in the right and left seats, operating the aircraft.

At the hearing, respondent argued that his actions did not violate either § 121.543(a) or Atlas' flight manual, but the law judge upheld the complaint. On appeal, respondent offers

² Section 121.543(a) requires, with certain stated exceptions, that each required flight crewmember on flight deck duty must remain at the assigned duty station with seat belt fastened while the aircraft is taking off or landing and while en route. Section 91.13(a) prohibits careless or reckless operations so as to endanger the life or property of another.

³ On our own motion, we will strike from the record new evidence submitted by respondent that is not authorized at this point in the proceeding.

⁴ Initial Operating Experience. The captain testified that this meant that the pilots had completed their simulator training and had their rating on the aircraft, but had not had operational/line training yet or their check rides. According to the Administrator's air safety inspector witness, IOE training normally takes about 25 hours. Tr. at 50.

numerous arguments, none of which warrants a different result.⁵

Respondent's main arguments can be grouped into four categories: (1) that the Administrator acted unethically and did not meet her burden of proof by failing to introduce numerous pieces of allegedly relevant material, failing to produce all possible witnesses, and failing thoroughly to investigate; (2) that the Administrator should have taken into account issues of circadian rhythm, sleep deprivation and fatigue, and crew resource management; (3) that respondent was unlawfully denied counsel by Atlas Air and by the Air Line Pilots Association; and (4) that respondent did nothing unlawful or unsafe.

The difficulty with respondent's arguments is that we are not here to make abstract determinations about whether we think a particular action is "safe," or if one action is safer than another. Our role here is to promote air safety by adjudicating alleged violations of the FARs, and we do so by reviewing the elements of the cited rule and the facts that are established on the record. As a matter of law, except perhaps in a most unusual circumstance not present here, a violation of the FARs involving

⁵ Respondent filed an appeal brief, along with numerous attachments. One of the attachments is a letter to the Board dated July 12, 2002, and partially entitled "Request for Appeal." We will consider this letter as part of respondent's appeal. Otherwise, and although the Administrator does not move to strike, we reject the other exhibits respondent attached to his appeal, which range from his 2001 federal tax return to his doctoral dissertation. The time to introduce evidence was at the hearing, and there is no showing that this material was not available at that time. In any case, the material is irrelevant to the issues before us and would not affect the result.

operational requirements is, by definition, an unsafe aviation practice.

In this case, respondent was charged with violating § 121.543(a). As noted, this section generally demands that each required crewmember on flight deck duty must remain at the assigned duty station. There is no question that respondent was a required crewmember; he was the relief pilot in a crew of three. He was also on flight deck duty. He admitted that he left his duty station on the flight deck a number of times while he was filling in for the captain and when the first officer was also off the flight deck. He stated that he left the flight deck for "probably four round trips for 15 minutes an hour." Tr. at 164.

Respondent argues that his absence was excused by one of the exceptions to the rule - 121.543(b)(2) - that is, his absence was in connection with physiological needs.⁶ However, while that might excuse respondent had the first officer been in the right seat during the absence, it does not and can not excuse him leaving unqualified pilots to fly the aircraft alone.⁷ The intent of the rule is clear. With a three-man crew, two crew are

⁶ Respondent testified that his shoulder was bothering him and he needed to get up and stretch it, although he also admitted to eating a meal while he was away from the flight deck. There is little case law defining "physiological" needs, but we would opine that the number and purpose of the breaks respondent took exceed the intent of the rule.

⁷ Indeed, it appears that the first officer left the cockpit for more than the acceptable short physiological break.

to operate the aircraft while one crewmember rests. As between the two crew, one at a time may leave the flight deck for short breaks to satisfy bodily needs. The violations began when the first officer left the cockpit and did not return. Respondent compounded the problem by, in effect, designating relief pilots for himself, and did so knowing they had not finished their training. Whether they were experienced enough or were safe pilots is besides the point. If a relief pilot needs himself to be relieved, it is his obligation to inform one of the "regular" crew, so that he may be replaced by an assigned crewmember.⁸

Respondent likens his situation to that of a check airman and student pilot. He argues that his actions were no different from the allowed physiological break a check airman may take, leaving the student pilot alone to fly the aircraft. However, respondent is not a check airman, and that exception has an obvious reason - there being no one else qualified to fly the aircraft. The same was not true in respondent's case.

Respondent claims that other assigned crew violated flight and duty time regulations, and that the crew and the air carrier failed to provide him adequate guidance. Even assuming that were

⁸ We categorically reject respondent's expressed concern that the pilot-in-command and first officer were too tired to return to the flight deck and he was choosing the safest course of action in leaving these unqualified pilots to fly the aircraft while he took breaks. There is no evidence that this was so. Respondent's citations and articles regarding fatigue are not proof here. Moreover, he improperly took that decision away from the captain of the aircraft when he chose not to send one of the pilot/observers to wake the captain or first officer.

true, and there is absolutely no basis for such conclusions, that would not excuse respondent's taking matters into his own hands by leaving the flight deck under the control of two pilots who had not completed their qualifying training, when all he needed to do to obtain the guidance he says he needed was to wake the captain.

We also reject respondent's procedural claim that the Administrator somehow failed her responsibilities as prosecutor here. Counsel for the Administrator has the burden of proof in these cases. Accordingly, counsel has no obligation to produce more (or certain) witnesses, or to conduct further (or particular) investigation. Respondent had the opportunity to conduct discovery and subpoena witnesses to develop his own defense.

Respondent's claim that he was denied representation is not a matter within our jurisdiction. In any case, there is no right to the appointment of counsel in these proceedings. His other claims - for financial and other relief for unjust termination and for development and implementation of an alarm for detection of weapons of mass destruction aboard aircraft - also are not within the scope of this proceeding.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. Except for his letter to the Board dated July 12, 2002, the attachments to respondent's appeal are stricken from the record; and

3. The 15-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.⁹

HAMMERSCHMIDT, Acting Chairman, and GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

⁹ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(f).